Supreme Court, U.S.
FILED

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No. 98 1912 MAY 20 1999

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1998

DANNY McGEE OWENS, **Petitioner,**

v.

UNITED STATES OF AMERICA, **Respondent.**

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In a trial where the offenses charged have no relationship to civil rights violations, racial hatred, or any other form of racial prejudice, can the revenant of racism ever be allowed to have its intolerant influence and persuasion injected into the trial without transgressing the fundamental constitutional rights of the accused even though those numerous injections were used only against white defendants? (Reverse discrimination)

2. Can a conviction stand where the trial court has totally failed to instruct what the State law on prostitution is when prostitution is one of the underlying charges to the federal offenses charged against the defendant?

3. Should the circuits be uniform in considering the applications of Section 2S1.1(b)(2) of the Sentencing Guidelines to Title 18 U.S.C. § 1956 with reference to co-mingled funds?

PARTIES TO THE PROCEEDING

In addition to Danny McGee Owens, other defendants are Blake Owens, Ira John Woodfin and Kay Miller Bennett.

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PETITION FOR WRIT OF CERTIORARI

Danny M. Owens respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals for The Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals For The Sixth Circuit is reported at 159 F.3d 221. (App.2) The opinion and order of the District Court for the Western District of Tennessee, Western Division were rendered on April 11, 1995, October 6, 1995, and were not reported. (App.46-54).

STATEMENT OF JURISDICTION

In The United States District Court For The Western District of Tennessee, Western Division, the Court of first instance, Owens was charged with violation of the following federal statutes: Title 18 U.S.C. §§1952, 1955, 1956 and 371; Title 21 U.S.C. §§841(a)(1) and 846. After conviction, a timely appeal was filed with the United States Court of Appeals For The Sixth Circuit; that court affirmed the judgment of the lower court on October 20, 1998. (App. 1) The Court of Appeals denied a timely petition for rehearing on December 23, 1998. (App. 21) This Petition is being timely filed by being postmarked on Tuesday, March 23, 1999, and forwarded by regular United States Mail to the Clerk of the Court.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution. The Sixth Amendment to the United States Constitution. 18 U.S.C. §1956 and the USSG 2S1.1(b)(2).

STATEMENT OF FACTS

1. Petitioner, Danny McGee Owens, owned four topless clubs in Memphis, Tennessee. In addition to owning and operating these businesses, Owens also leased property on a monthly basis to three businesses commonly called "peep shows". Owens owned and operated a bookkeeping company in Memphis called Talent South which oversaw bookkeeping and management for Owens' clubs and lease payments from the leased property.

2. Each topless club charged a cover charge to patrons to enter. Upon payment of this fee, customers could view topless dancers perform on stage, and purchase beer. Patrons could also purchase separate dances from dancers of their

choice.[1] "Table dances", "couch dances" or "slow dances", were made available for differing prices from dancers.

3. Dancers were fined or fired for committing sexual acts inside the clubs and also for leaving the clubs before the end of their work shift without a legitimate excuse. The Government claimed that the use of fines for dances constituted the collection by Owens of proceeds from those illegal actions by his dancers.[2]

A Government witness stated that he was told to

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1. A manager kept track on a "dance sheet" of the number of dances each dancer performed for customers. At the end of their shift, each dancer was required to pay the club a specific amount of money for each dance she performed for customers, as recorded by "dance marks" on the dance sheet. The dancers made their profit from the purchase of dances, and from customer tips.

2. Owens admitted that he used fines to deter sex acts, touching customers, and drugs, which necessarily constituted an admission that dancers may have occasionally committed such acts.

mark down extra "dance marks" for a dancer whenever he observed her committing a sexual act with a customer or for touching a customer.

4. The second category of prostitution related objectives charged in Count One's multi-objective conspiracy concerned the operation of businesses the Government dubbed "houses of prostitution", but commonly called "peep shows" by everyone else.

5. These businesses obtained their nickname "peep shows" from live shows, commonly called peep shows, involving a female employee (model), who danced in a private booth for patrons.[3]

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3. A set fee allotted the customer a show by the model of his choice behind a glass partition within the booth. For various "tips" the model would remove some or all of her clothing while the customer watched. The businesses offered the private viewing of triple-x rated movies in a "showroom" for a pre-set fee, usually $30.00. A patron could receive the company of a "model" of his choice for viewing these movies at an additional fee, usually $50.00.

6. These types of adult entertainment are legal in the State of Tennessee. However, illegalities occurred whenever a model engaged in prostitution within a showroom. Models did engage in prostitution with customers during the viewing of movies in the showrooms for illegal extra tips.

7. Owens was indicted for: (1) conspiracy to operate an illegal gambling business in violation of 18 U.S.C. § 1955, to use facilities in interstate commerce in aid of racketeering in violation of 18 U.S.C. § 1952, to conceal the nature of an interstate prostitution enterprise by laundering money in violation of 18 U.S.C. § 1956, and to conceal the nature of an interstate gambling enterprise by laundering money in violation of 18 U.S.C. § 1956, all in violation of 18 U.S.C. § 371 (count I); (2) conspiracy to distribute Schedule II controlled substances in violation of 21 U.S.C. § 846 (Count II): (3) possession with intent to distribute a Schedule II controlled substance in violation of 21 U.S.C. §

841(a)(1)(Count III); (4) operation of an illegal gambling business in violation of 18 U.S.C. § 1955 (Count IV); and (5) money laundering in violation of 18 U.S.C. § 1956(a)(1) (Counts IX-XXIV). After a lengthy trial, Owens was convicted on all counts except Counts II, III, and XXII-XXIV.

8. The court, over objection and offer of stipulation, allowed evidence of a racially motivated assault through a government witness for the purpose of bias of that witness, not of the defendant, Mr. Owens. After admission of the evidence and a written motion for mistrial, the government added that the evidence was relevant to show knowledge and control of the clubs. The court found the racial evidence was not prejudicial. The State introduced, through multiple witnesses, racist rules and policies in the clubs enforced by Mr. Owens.

9. The Court instructed the jury as to the state criminal law

of prostitution without the elements required and used the statutory definition:

"Prostitution" means engaging in sexual activity as a business or being an inmate in a house of prostitution or loitering in a place for the purpose of being hired to engage in sexual activity. T.C.A. § 39-13-512(5)

The court read the indictment which indicated that Defendants marked down extra dances for:

"couch dances or slow dances, which often involved sexual contact between the dancer and the customer."

in its allegations of prostitution.

At sentencing, all rents received by Owens from all these three peep show locations were used in the offense level calculations. In addition, the Government included all credit card receipts for these business which, if the Government's theory is accepted, was already included in rent payments from the peep shows. In addition, all of Mr. Owens' management fees for the four topless clubs and the bookkeeping company were included.

REASONS FOR GRANTING PETITION

1. The United States Court of Appeals for the Sixth Circuit has entered a decision in conflict with other United States Courts of Appeal on the same important matters. The Sixth Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings and sanctioned such a departure by a lower court as to call for an exercise of this Court's supervisory power.

2. The lower court and the Sixth Circuit Court of Appeals have rendered decisions denying constitutional rights to defendants.

ISSUE I: IS EVIDENCE OF A RACIALLY MOTIVATED ASSAULT AND RACIALLY DISCRIMINATORY RULES ADMISSIBLE IN THE FACE OF AN OFFER TO STIPULATE TO ALL FACTS OTHER THAN THE RACIAL MOTIVATION UNDER FRE 404(b)

1. The D.C. Circuit Court of Appeals has held in a "spotted cow case", that a racial issue has unfair prejudice and when not relevant to the crime, charges should be excluded.

2. During the trial on charges of gambling, prostitution, drugs and money laundering, the court admitted evidence of racially motivated assault, over objection and offers to stipulate to all of the facts except for the racial context.

3. Initially this was offered only for bias. However, after admission and in response to a written motion filed the next day, the Government argued that it went to knowledge of what went on in the clubs. The racial incident revolved around testimony that Mr. Owens physically assaulted a white dancer for dancing with a black patron. The Government claimed it was trying to establish bias of its own witness. The District Court ruled that even though eight of the twelve jurors were black, that acts of violence motivated by race were not prejudicial at all and that bias of witnesses were proper as 404(b) evidence against the defendant.

4. After the ruling, the Government introduced other racially discriminatory rules and practices in force at the topless

clubs, again over objections, with Marsha Schaffer and other witnesses.[4] It is undisputed that Danny Owens charged fines for dancers leaving the club and that other government witnesses including Schaffer could testify as to Danny's knowledge and control of the clubs. It is also undisputed that the other witnesses would testify that Danny punished dancers for drugs in the clubs and witnesses testified that he marked extra dances for drugs sold. It is also undisputed that Danny strictly enforced club rules some of which would include paddling. These substitutions that showed Owens' knowledge and control of the clubs were available, as well as, the offered stipulation instead of using the highly inflammatory racial evidence. The court made no analysis or balancing test since its finding was that the evidence was not prejudicial. If it is contended that in fact the court did do an

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4. See other racial injections, over objections, in Petition for Rehearing En Banc, App.25-41.

analysis, it did not take into account other evidence, as well as, the stipulation.

5. The Sixth Circuit Court of Appeals found that the court did not abuse its discretion in that decision and did not apply the reduced probative value of the evidence in light of the offered stipulations and in light of other cumulative evidence instead that is required in other circuits. *United States v. Old Chief*, 117 S.Ct. 760 (1997).

6. This Court's decision in *Dawson v. Delaware*, 503 U.S. 159, 164, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992) concluded the beliefs of racial hatred are per se prejudicial. *Miller v. State of N.C.*, 583 F.2d 2701, 707 (3rd Cir. 1978). There can be no dispute that a per se rule of reversal is present for closing arguments. However, there is a per se rule of unfair prejudice. If there is a determination of unfair prejudice, then this brings us to *United States v. Old Chief*, 117 S.Ct. 760 (1997).

7. **The Sixth Circuit Court of Appeals has refused to apply Old Chief principles at all, outside the context of a felon in possession of a firearm charge, and by doing so is in direct conflict with this Court and with other Circuits.**

8. The Eighth Circuit Court of Appeals has applied an *Old Chief* analysis to Rule 404(b) decisions involving rule 403, holding the court is required to consider the reduced probative value of evidence in face of offered stipulations, as well as, other substitutes. *United States v. Blake*, 107 F.3d 651, 652 (1997).

9. The Ninth Circuit Court of Appeals has likewise found that evidence probative to real issues in the case (not to collateral issues at best) should be viewed in light of offer to stipulate that material contained child pornography and traveled in interstate commerce and other evidence, must have probative value discounted. If discounted, probative value is substantially outweighed, and excluded. *United*

States v. Merrino-Balderrama, 146 F.3d 758 (9th cir. 1998) (movie could not be played)

10. The Ninth Circuit Court of Appeals referred to the committee notes in FRE 401 quotations as to a preferred admission, it is "not merely but seemingly conclusive evidence of the elements."

11. Two other circuits have done a Rule 404(b) analysis differently and not in accord with the district court and the Sixth Circuit Court of Appeals.[5] The initial offer of racial evidence was for a bad act and a crime, that of assault.

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5. The Seventh Circuit Court of Appeals applies a four part test for a 404(b) analysis: 1. Evidence directed other than propensity; 2. Other act must be similar to charged conduct, close in time; 3. Evidence sufficient to support a jury finding that defendant committed similar act; 4. Probative value not substantially outweighed by unfair prejudice. *United States v. Hernandez*, 84 F.3d 931 (7th Cir. 1996).

The Tenth Circuit Court of Appeals applies also a four part test for 404(b) bad acts: 1. Evidence offered for proper purpose; 2. Evidence relevant under 401; 3. Probative value not substantially outweighed by potential unfair prejudice under 403; 4. Curative instruction. *United States v. Wilson*, 107 F.3d 774 (10th Cir. 1997).

12. The condition that both of these circuits require is that 404(b) evidence of the crime be close in time, highly probative, and similar to the activity for relevance. The action in this case of racially motivated assault and racial rules are not similar, were not shown to be close in time, and were not highly probative.

13. Another Rule 404(b) exceptions would seem to require that knowledge for instance be relevant to underlying offenses, i.e., gambling, prostitution, money laundering, not control of the clubs.

ISSUE II: DOES A JURY INSTRUCTION UNDER 18 U.S.C. §1956 HAVE TO INCLUDE STATE LAW ELEMENTS, ESPECIALLY WHEN THE INSTRUCTION STATES THAT COUCH DANCES ARE PROSTITUTION WHEN THEY ARE NOT UNDER A DECISION BY THE TENNESSEE COURT OF CRIMINAL APPEALS?

1. The Sixth Circuit Court of Appeals in this case found that the underlying elements of the state law allegedly violated are not required in a 18 U.S.C. §1952(a)(3)(A) when the offenses

and that a specific unanimity instruction was not required under a plain error analysis.

2. The court read the statute for prostitution during the money laundering instructions and the statute for guidelines in the money laundering and conspiracy case. The court did not even read the prostitution statute in the conspiracy count. The Tennessee courts, while not finding it unconstitutionally vague, overturned a conviction for a prostitution business based on "sexual activity", not intercourse. The court found that a jury could, and did conclude, that nude dancing with physical contact between the dancer and the patron was a business for "sexual activity" and violated the very statutes read by the trial court in this case. The court reversed and found the statute "does not clearly prohibit the conduct of the Defendants in the Case sub judice." *State v. Boyd*, 925 S.W.2d 237, 243 (TN Ct. Crim. App. 1995). The jury instructions read for the indictment, in the case at bar, stated,

as to prostitution at the topless clubs, "when a dancer performed certain types of dances, such as 'couch dances' or 'slow dances', which often involved sexual contact between the dancer and the customer, the housemother manager, would mark multiple dance marks for that dancer."

3. In this case, four of the businesses were topless dancing clubs in which there were table dances, couch dances, etc., or where there was some physical contact between the parties. The Jury was allowed and instructed to convict the parties to the conspiracy based on legal table dances.

4. The Sixth Circuit Court of Appeals relied on *United States v. Sanderson*, 966 F.2d 184, 186 (6th Cir. 1992), which held a plain error analysis for reversal requires "We consider whether the instructions when taken as a whole, were so clearly wrong as to produce a grave miscarriage of justice."

5. Other circuits apply the *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed. 2d 508 (1993); and *Johnson*

v. United States, 520 U.S. 461, 117 S.Ct 1544, 137 L.Ed.2d 718(1997) to the extent of four prongs. The harmless error analysis of the fourth prong has never required "a grave miscarriage of justice before reversal."

6. See also *United States v. Martinez*, 136 F.3d 972, 976 (4th Cir. 1998); *United States v. Savage*, 67 F.3d 1435, 1439 (9th Cir. 1995); *United States v. Jackson*, 935 F.2d 832, 842 (7th Cir. 1991); *United States v. Jones*, 909 F.2d 533, 537 (D.C. Cir. 1990); *United States v. Davis* 965 F.2d 804, 816 (10th Cir.); and *United States v. McNeal*, 77 F.3d 938, 944 (7th Cir. 1996).

7. The error in the Court below is further aggravated in this multiple conspiracy case by the failure to give a unanimity instruction. *United States v. Shaoul*, 41 F.3d 811, 817 (2nd Cir. 1994); *United States v. Walker* 25 F.3d 540, 546 (7th Cir. 1994). The ruling of the Sixth Circuit Court of Appeals is in direct conflict with all the above circuits.

ISSUE III: IS THE DISTRICT COURT REQUIRED TO MAKE A FINDING THAT THE VALUE OF FUNDS USSG 2S1.1(b)(2) ARE TRACEABLE TO SPECIFIED ILLEGAL ACTIVITY IN THE FACE OF OBJECTIONS TO INCLUSION OF SOME OF THE FUNDS?

1. The District Court held that all funds received by Danny Owens from rent on the "peep shows" building, in management fees for the four topless clubs and the bookkeeping service, and the $155,000.00 in credit card receipts for the "peep shows" which would already at least partially have been included in the rent fees were includable as funds for calculation of the enhancement.

2. The Sixth Circuit Court of Appeals relied upon a decision that for conviction purposes all funds were not required to be traced. *United States v. Bencs*, 28 F.3d 555 (6th Cir. 1994) held that all commingled funds could be included.

3. There is no dispute, nor could there be, that the four topless clubs were mainly legitimate businesses. Even taking the testimony in the light most favorable to the Government,

the clubs had cover charges, sold alcoholic beverages and setups with a drink minimum, and sold legal dances. There was no testimony that all, most, one half, one fourth, or even one tenth of the dances on the sheets were from illegal acts of prostitution. The only testimony that any of the money in the topless clubs came from prostitution was that managers, when they saw an illegal sex act, would mark down extra dances on the dance sheet for the dances and when dancers left their shift early there were extra dances marked on the sheet.[6] There can be no dispute that most, if not almost all dance marks were for table dances, or sofa dances which

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6. Some dancers indicated arrests for violating the 12-inch rule which was an ordinance prohibiting nude dancers from coming within 12 inches of customers and having physical contact with customers. However, there is no argument that this would qualify as prostitution, although the jury was instructed that it did.

were legal and which were not prostitution.[7] All money Mr. Owens received over a thirty three month period was included ($474,800.00) from the four topless clubs. There was no testimony that the management and bookkeeping company received funds of specified illegal activity unless you include again the credit card receipts included separately which some were directly deposited into Danny's club account ($155,000.00 included in reaching the level assigned to him).

4. The credit card receipts went into an account for Danny's which was used to pay rent to Mr. Owens and management fees to the bookkeeping service.

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7. Dancers were fined and/or fired for committing sex acts in the clubs (This is a standard in the industry and the managers who testified for the Government also committed the practice for (some before and after working for Mr. Owens) Masseurs, Cooper and Lunati who defense attorneys were not allowed to inquire into even as to credibility of where the instruction for this practice originated also violating Owens' Confrontation rights.

5. The "peep shows" which did in fact have a partially legitimate business of movies and dances behind a glass wall, definitely had a strong percentage of their income from illegal acts of prostitution. However, the testimony on behalf of the Government linking Mr. Owens and any others to the business other than the Government witness taken in the light most favorable to the Government, was that rent to run a "peepshow" business without prostitution would be $1200.00 and with it would be $2400.00. (50% proceeds from specified unlawful activity).

6. Only one Circuit has decisions providing any support for the position the Sixth Circuit has taken. *United States v.Cihak*, 137 F.3d 252, 263 (5th Cir. 1998); and *United States v. Tansley*, 986 F.2d 880 (5th Cir. 1993) [holding drug funds filtered into banks but yet to be laundered (intended to be laundered could be included)].

7. The Eighth Circuit Court of Appeals found that in the face

of objection, the court was required to make a finding that the amount actually had been paid and laundered. (Defendant did not dispute he received $458,000 in two marijuana transactions). *United States v. Mahler* 984 F.2d 899, 904-5 (8th Cir. 1993)[8] This decision was not upheld even though all funds in question were from specified illegal activity. The Ninth Circuit Court of Appeals has likewise held that funds from wire fraud not yet shown to have been laundered could not be included in value of funds, only amounts which had already been laundered. *United States v. Taylor,* 984 F.2d 298 (1993); See also from Tenth Circuit Court of Appeals *United States v. Johnston,* 971 F.2d 562, 576 (10th Cir. 1992). Again in the Ninth Circuit all funds were traceable to illegal activity specified in the act.

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8. The Eighth Circuit Court of Appeals has even found that the activity of depositing funds in an account with your name justified a downward departure and all funds in this case were deposited by Mr. Owens in his account. *United States v. Woods*, 159 F.3d 1132, 1134 (8th Cir. 1998).

8. The Eleventh Circuit Court of Appeals includes the value of funds aggregate of all funds involved with the money laundering scheme but traces the funds. *United States v. Mullens*, 65 F.3d 1560, 1563 (11th Cir. 1995; *United States v. Barrios*, 993 F.2d 1522, 1523 (11th Cir. 1993) [Court properly included interest earned on drug funds while being passed through banks found traceable to specified unlawful activity]. The Third Circuit Court of Appeals also includes the aggregate value of funds for specified unlawful activity. *United States v. Thompson*, 40 F.3d 48, 52 (3rd Cir. 1994).

9. Clearly, the burden of proof is on the Government to trace or identify the funds used in a money laundering scheme to arrive at the sentencing amount. *Mahler*, at 904-5. The Courts in this case, did not even require the Government to prove anything at all,even though the amounts of money included in the P.S.I. report were challenged by the Defendants.

10. No tracing was done and simply everything that went into Mr. Owens accounts for any of the businesses was included as well as money for credit card transactions which were automatic deposits into the bank account, allowing the credit card receipts to be double counted.

11. There is a split among the circuits with the Sixth Circuit standing alone. The purpose of the sentencing guideline was to allow some sort of uniformity for money laundering in sentencing.

CONCLUSION

The scars of man's inhumanity to man have stretched across my native State for many generations in a black/white scenario, but I submit that there has never existed in a Mississippi trial court the appeals to racial bias that occurred in this case, sub judice.

Once the Government opened the initial wound, the remainder of the trial was spent watching the sore fester from

numerous, continual racial entries until it became a cancer that destroyed the entire face of justice. The Writ should be granted for this reason, as well as, the other two reasons assigned.

Respectfully submitted,
ORIGINAL SIGNED BY
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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 95-6357; 95-6405; 95-6631; 95-6632

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DANNY OWENS (95-6357), BLAKE OWENS (95-6405),
IRA JOHN WOODFIN (95-6631), and
KAYE MILLER BENNETT (95-6632),
Defendants-Appellants.

Before: KRUPANSKY, NORRIS, and SILER, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Western District of Tennessee at Memphis

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgments of the district court are AFFIRMED in their entirety.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green, Clerk

Filed: October 20, 1998

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1998 FED App. 0314P (6th Cir.)

File Name: 98a0314p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. *Nos. 95-6357*, 6405, 6631, 6632

DANNY OWENS(95-6357),
BLAKE OWENS(95-6405,
IRA JOHN WOODFIN(95-6631), and
KAYE MILLER BENNETT(95-6632).
Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Tennessee at Memphis
No. 92-20289--Odell Horton, District Judge

Argued: August 4, 1998

Decided and Filed October 20, 1998

Before: KRUPANSKY, NORRIS, and SILER, Circuit Judges.

COUNSEL

ARGUED: Jefferson D. Gilder, Southaven, Mississippi, John M. Colette, JOHN M. COLETTE & ASSOCIATES, Jackson, Mississippi, Wayne Chastain, Memphis, Tennessee, Robert E. Harrison, HARRISON & GOIN, Scottsville, Kentucky, for Appellants. Frederick H. Godwin, OFFICE OF THE U.S. ATTORNEY, Memphis, Tennessee, for Appellee.
ON BRIEF: Robert G. Gilder, Southaven, Mississippi, John M. Colette, JOHN M. COLETTE & ASSOCIATES, Jackson, Mississippi, Kathleen L. Caldwell, TAYLOR, HALLIBURTON, LEDBETTER & CALDWELL, Memphis, Tennessee, Robert E. Harrison, HARRISON & GOIN, Scottsville, Kentucky, for Appellants. Frederick h. Godwin, OFFICE OF THE U.S. ATTORNEY, Memphis, Tennessee, for Appellee.

OPINION

SILER, Circuit Judge. Defendants appeal their convictions and sentences for their roles in an interstate drug, prostitution, and gambling conspiracy. They raise numerous issues including: (1) admission of evidence of violent and racial incidents at the business; (2) exclusion of

evidence tendered for the defendants; (3) the constitutionality of the statutes involved; (4) bias by the district judge; (5) erroneous instructions; and (6) sentencing errors. As set for below, we **AFFIRM.**

I. BACKGROUND

In 1992, nine persons, including appellants, were indicted for conspiracy and substantive charges relating to a gambling, prostitution, and drug trafficking operation. Among the accused were: Danny Owens ("Danny"), the owner of the business establishments -- predominantly topless clubs and "peep shows" -- out of which the operation ran; Blake Owens ("Blake"), Danny's son and apparently a partner or employee at one or more of those business establishments; Ira John Woodfin, a manager at one such business establishment called "Eve's"; and Kaye Miller Bennett, a manager at another such business establishment called "Danny's."

Danny was indicted for: (1) conspiracy to operate an illegal gambling business in violation of 18 U.S.C. § 1955, to use facilities in interstate commerce in aid of racketeering in violation of 18 U.S.C. § 1952, to conceal the nature of an interstate prostitution enterprise by laundering money in violation of U.S.C. § 1956, and to conceal the nature of an interstate gambling enterprise by laundering money in violation of 18 U.S.C. § 1956, all in violation of 18 U.S.C. § 371 (count I); (2) conspiracy to distribute Schedule II controlled substances in violation of 21 U.S.C. § 846 (Count II): (3) possession with intent to distribute a Schedule II

controlled substance in violation of 21 U.S.C. § 841(a)(1)(Count III); (4) operation of an illegal gambling business in violation of 18 U.S.C. § 1955 (Count IV); and (5) money laundering in violation of 18 U.S.C. § 1956(a)(1) (Counts IX-XXIV). Blake was only charged in Counts I and IV. Woodfin was indicted under Counts I,IV, IX, and X, and with three other money laundering counts (Counts XXV-XXVII). Finally, Bennett was charged in Counts I,II, and IV.

After a lengthy trial, Danny was convicted on all counts except Counts II, III, and XXII-XXIV. Blake and Woodfin were found guilty on all counts. Finally, Bennett was convicted on Counts I and IV, but not Count II.

In the course of the trial, the United States introduced evidence on an overt act in furtherance of the gambling conspiracy in which Danny and Blake restrained and beat John Howard, an employee they suspected of having stolen money out of electronic gambling machines Danny Owens. The Owenses handcuffed Howard, stretched him over a desk in an office, pulled his trousers down, and beat him with a large wooden paddle. When Howard attempted in the course of the beating to stand, Blake prevented him from doing so by forcing the point of his elbow into Howard's back. As a result of the episode, Howard suffered scarring and severe bruising. The government also introduced evidence that Danny enforced certain racist policies in his clubs.

Further, the defendants attempted to introduce evidence with respect to the role of an Assistant United States Attorney not associated with the instant prosecution.

They alleged he had a vendetta against Danny, and improperly used Steve Cooper, a competitor, in procuring witnesses and in accumulating evidence. In opening argument, counsel for Danny indicated that the jury would see that the prosecution of his client was the product of ill-feeling by AUSA Tim DiScenza toward Danny and the financial motives of Cooper in eliminating competition. The court, however, limited all inquiry into DiScenza's and Cooper's roles in the prosecution to any influence they might have exercised over testifying witnesses. In addition, it refused to permit defense counsel to attempt improperly to create an impression in the jurors' minds that either DiScenza or Cooper threatened or influenced a witness.

The court also declined to permit the defendants to introduce evidence of common practices within the topless bar industry. A key element of the government's case concerned the use of "fines" for dancers who would leave one of Danny's topless clubs during their shift. The government alleged that the fines were the method used by management to collect its share of the money a dancer derived through prostitution. In order to counter the government's theory, the defendants sought to question witnesses about the practices of other topless bars in the area with respect to fines.

In addition, in the course of the three-month trial, the district court periodically interrupted questions by the defense either in order to allow the prosecution to object to a question or answer, or to interject its own observations. Defendants cite eight-four instances in which the district

judge: (1) interrupted witnesses to tell them only to answer the question asked, not to speculate, or not to answer a question posed by Danny's counsel; (2) displayed impatience with a witness ro defense counsel in the presence of the jury; (3) admonished a witness or defense counsel in the presence of the jury; and/or (4) stated an objection without prompting from the prosecution. In view of what the defense saw as unfair and biased treatment from the court, the defendants moved for a mistrial on at least three occasions over the course of the trial.

Finally, in its instructions, the district court charged the jury as to the essential elements for each offense. In connection with Counts I and IV of the indictment, it instructed the jury on the sections of the Tennessee statutes relevant to the predicate state gambling offenses under 18 U.S.C. §§ 1952 and 1955. It provided a general unanimity instruction to the jury, but did not instruct the jury that the verdict must be unanimous as to all the conduct supporting the guilty verdict.

II. ISSUES

A. Evidentiary Problems

Appellants Danny and Blake claim that the district court improperly admitted evidence of the Howard beating incident and of Danny's different treatment of white and black customers and employees. They specifically claim that the potential prejudice resulting from the admission of this evidence -- particularly the admission of evidence of

racist policies to a predominantly black jury -- far outweighed the probative value of that evidence.

This court reviews admissibility issues for abuse of discretion. *United States v. Sassanelli*, 118 F.3d 495, 498 (6th Cir. 1997). Under this standard of review, this court takes a maximal view of the probative effect of the evidence and a minimal view of its unfairly prejudicial effect, and will hold that the district court erred only if the latter outweighs the former." *Id.*

From this perspective, the Owenses' argument is unavailing. With respect to the Howard beating incident, the evidence of violence is relevant to the conspiracy charge in the indictment, which specifically alleged that "[i]n late May or Early [sic] June, 1991,. . . [Danny and Blake] participated in the beating of an individual accused of stealing from [Danny's] electronic gambling devices." The admission of the evidence thus easily satisfies FED.R.EVID. 402. As to the claim that the potential prejudice outweighs the probative value of the evidence, courts routinely admit evidence similar to that admitted here in conspiracy cases in order to prove the patterns and practices of the conspiracy. *See United States v. Wilson*, 11 F.3d, 346, 353 (6th Cir. 1993). Thus, there is little or no support for the Owenses' claim that the district court abused its discretion in failing to find the evidence about the Howard beating to be overly prejudicial.

As to Danny's objection to the admission of evidence of racist policies, this argument also fails. His contention

hinges largely on the decision in *United States v. Old Chief*, 117 S.Ct. 760 (1997), which held that a court cannot admit evidence of prior crimes in order to satisfy an element of a felon in possession of a firearm charge where the defendant stipulates to the prior felony conviction. He argues that because he was willing to stipulate to the bias of a witness, Marsha Schaffer, the government could not seek to introduce evidence of that witness's bias against Danny that she developed as a result of a racial incident. However, as the Court noted in *Old Chief*, a mere offer of stipulation to an element of an offense or certain evidence does not render those matters irrelevant and, hence, inadmissible. *Id.* At 650. Rather, subject to the limited exception of felony-convict status, the Court reaffirmed "the accepted rule that the prosecution is entitled to prove its case free from any defendant's option to stipulate the evidence away." *I.d* at 654.

Thus, *Old Chief* leaves Danny to challenge the admission of the racial evidence strictly on the basis of its probative value versus its potential for prejudice. The district court determined that the evidence was relevant to the bias issue and to the control Danny exercised over the illegal activities charged and that the potential for prejudice arising out of admission of such evidence was outweighed by the probative value of the evidence. Danny has failed to show how this determination is an abuse of discretion.

B. Constitutionality of Statutes

Woodfin argues that under *United States v. Lopez*,

115 S.Ct. 1624 (1995), 18 U.S.C. §§ 1955 and 1956, the gambling and money laundering statutes, exceed Congress's authority to legislate pursuant to the Commerce Clause, U.S. CONST. Art. I, § 8, cl. 3. He specifically claims that in the absence of a substantial effect on interstate commerce, Congress cannot seek to regulate an area of criminal enterprise.

The *Lopez* decision struck down 18 U.S.C. § 922(q) -- the federal law prohibiting firearm possession on or near school grounds -- on the grounds that such a law fell outside of Congress's commerce power. In so holding, the Court set forth certain criteria to determine the propriety of a federal criminal statute under the Commerce Clause.

As to the challenge to § 1955, this court has upheld that law in the face of a *Lopez* challenge. *United States v. Wall*, 92 F.3d 1444 (6th Cir. 1996). The defendants' challenge to § 1956 is equally unavailing. Although the Sixth Circuit has never had occasion to address an attack on the money laundering statute under *Lopez*, other circuits have found the statute constitutional as a proper exercise of the commerce power. *See United States v. Westbrook*, 119 F.3d 1176, 1191-92 (5th Cir. 1997), *cert. denied*, 118 S.Ct. 1060 (1998); *United States v. Leslie*, 103 F.3d 1093, 1100 (2nd Cir.), *cert. denied*, 117 S.Ct. 1713 (1997); *United States v. Griffith*, 85 F.3d 284, 286-288 (7th Cir.), *cert. denied*, 117 S.Ct. 272 (1996); *United States v. Baker*, 82 F.3d 273, 275-276 (8th Cir.), *cert. denied*, 117 S.Ct. 537 (1996); *United States v. Grey*, 56 F.3d 1219, 1223-25 (10th Cir. 1995) (but reversing conviction on grounds that § 1956 was improperly

implied to the defendant). Perhaps the most pertinent lesson of these decisions -- at least for present purposes -- is that the use of federally insured banks and/or the transport of monies across state borders to facilitate the money laundering create a sufficient nexus to interstate commerce to allow application of § 1956. *Griffith*, 85 F.3d at 287-88; *Baker*, 82 F.3d at 275-276. This connection alone is enough to place § 1956 into *Lopez*'s second category, *i.e.*, into the range of statues governing "the instrumentalities of interstate commerce. . . even though the threat may come only from intrastate activities." *Id.* At 275 (citing *Lopez*, 115 S.Ct. At 1629-30). Where a statute regulates the "instrumentalities of interstate commerce," the law need not address conduct having a substantial effect on interstate commerce in order to survive a constitutional challenge. Rather, the mere character of the activities covered under the statute make them properly the subject of federal regulation. *Lopez*, 115 S.Ct. At 1629.

Here, the monies derived from the illegal activities not only were deposited in a federally insured bank, but were transported from Tennessee to Mississippi for deposit. Accordingly, § 1956 can permissibly apply simply by virtue of the nature of the transactions in which the defendants engaged in their efforts to conceal their illegal activities.

C. Evidence for the Defense

Woodfin argues that the court erred by refusing to allow the defendants to introduce evidence or to question witnesses about the role of Cooper and DiScenza in the

investigation of Danny's operation. This court reviews such trial court limitations on the scope of defense inquiry for abuse of discretion. *United States v. Burge*, 990 F.2d 244, 249 (6th Cir. 1992).

Woodfin's claim is meritless. Regardless of whether the district court characterized the attempt to question witnesses about any Cooper/DiScenza connection as part of an "outrageous government conduct defense" under *United States v. Payne*, 962 F.2d 1228, 1232 (6th Cir. 1992), the court did not abuse its discretion by allowing questioning only as to possible improper influence either Cooper or DiScenza may have exercised over government witnesses. Here, the trial court sought to prevent the jury from drawing unwarranted conclusions based simply on the fact that either Cooper or DiScenza -- neither of whom testified at trial -- had an interest in Danny's conviction. Much as in *Burge*, it is difficult to see how the excluded testimony, "which may have reflected on the testimony of [Cooper or DiScenza] would have helped to establish a reasonable doubt as to whether the defendant[s] committed the crimes charged." *Burge*, 990 F.2d at 248.

Woodfin further contends that the district court should have permitted the defendants to introduce evidence of an industry-wide custom of imposing fines in order to deter -- not to profit from -- prostitution. The district court ruled that the industry practice was irrelevant to the conduct of Danny's clubs. This court reviews such trial court limitations on the scope of defense inquiry for abuse of discretion. *Burge*, 990 F.2d at 249.

Woodfin's argument fails. The court weighed the potential for confusion and misdirection against the probative value of the proffered evidence and determined that it was irrelevant. What is more, in light of the defendants' introduction of other evidence showing that the fines were for the purpose of deterring prostitution and absenteeism, they had an opportunity to develop this defense. The district court thus did not abuse its discretion in excluding the evidence with respect to the competitor's use of fines.

D. Judicial Bias

Danny claims that the judge's conduct deprived the proceedings of the appearance of impartiality and thereby destroyed the defendants' chance for a fair trial. Defendants preserved some of their objections to the court's conduct, but failed to preserve other parts. If the objection was properly preserved, this court reviews charges of judicial bias for plain error. *See United States v. Segines*, 17 F.3d 847, 851-52 (6th Cir. 1994).

Although the trial judge here was at times harsh in his treatment of defense counsel, if his conduct was erroneous, it was harmless. His actions do not rise to the level of bias exhibited by the trial judges in the cases in which this court has found plain error as a result of bias. *See id.; United States v. Hickman*, 592 F.2d 931 (6th Cir. 1979). Rather, the transcripts evoke an image of a judge weary of a lengthy trial and looking to save time, not that of a judge favoring one side over another.

Moreover, applying the three considerations *Hickman* prescribes to this case, there is no plain error. *Hickman* suggests that a reviewing court examine (1) "the nature of the issues at trial," (2) "the conduct of counsel," and (3) "the conduct of witnesses." *Hickman*, 592 F..2d at 933. Here, in contrast to *Hickman*, the trial involved a complex, multi-object conspiracy and collateral issues of state law tried to a jury over the course of months. Further, defense counsel was prone to revisiting issues the court had previously settled. Finally, many of the defense witnesses had difficulty confining their answers to the questions asked. In view of these three factors, a certain degree of frustration on the part of the trial court is understandable. Therefore, Danny's bias argument fails.

E. Instructions

Bennett claims that the district court failed to adequately to advise the jury of the elements of the predicate state offenses for the counts alleging violations of 18 U.S.C. §§ 1952 and 1955. She contends that the district court erred when it did not inform the jury of any aspect of TENN. CODE ANN. § 39-13-515 concerning "prostitution promotion" and in failing to inform the jury of the "elements" of the state gambling and prostitution offenses — as opposed to the definitions of those offenses — relevant to the federal offenses. She further posits that the district court should have provided the jury with a "specific" unanimity instruction, rather than the general unanimity instruction the court included in its charge to the jury. Because the defendants failed to raise either of these arguments below,

this court will review the instructions only for plain error *United States v. Sanderson*, 966 F.2d 184, 187 (6th Cir. 1992).

Bennett's first argument is meritless. As to her claim that the district court was required to instruct the jury on TENN. CODE ANN. § 39-13-515, the indictment makes no mention of that law as a predicate offense to the defendants' 18 U.S.C. § 1952 liability. Presumably, Bennett's confusion in this regard stems from the charge in Count I alleging that the co-conspirators acted "with the intent to promote the carrying on of a prostitution business...." It appears that Bennett has seized upon this language to argue that the promotion offense derives from state law. However, 18 U.S.C. § 1952(a)(3)(A) provides an independent basis for criminal sanctions for promoting any act illegal in the state in which it is committed. Thus, it was sufficient for the court to instruct on prostitution generally in Tennessee and the elements of § 1952.

With regard to Bennett's claim that the court should have instructed the jury as to the "elements" of the state gambling and prostitution offenses, Bennett fails to identify how the description of the state crimes the district court read to the jury was inadequate or erroneous. The sole support Bennett for her argument is *United States v. Jones*, 909 F.2d 533. 538 (D.C. Cir. 1990), in which the trial court read the definitions of the predicate state offenses, but then effectively instructed the jury that those definitions were not binding on the jury's determination. Here, by contract, the district court did not so modify the state law definitions. I

light of Bennett's failure to distinguish between the definitions of the state crimes the court read to the jury and her vague conception of the elements of the offenses, the district court did not abuse its discretion, much less commit plain error. *See United States v. McNeal*, 77 F.3d 938, 944-945 (7th Cir. 1996) (court's exclusive reliance on definition of crime contained in statute to instruct jury was appropriate).

Bennett's unanimity instruction argument is also without merit. As this court noted: "[o]rdinarily it is not necessary to give specific unanimity instructions unless 1) a count is extremely complex, 2) there is variance between the indictment and the proof at trial, or 3) there is a tangible risk of jury "confusion." *Sanderson*, 966 F.2d at 187.

The district court did not plainly err in its failure to provide a specific unanimity instruction on the counts to which Bennett refers here. Contrary to Bennett's assertion, Count I did not allege nine separate target offenses, but rather only four such offenses. Likewise, count IV, the other count under which the jury found Bennett guilty, charged only one offense, albeit with four possible predicate state crimes. To this extent, the counts under which Bennett was convicted are not quite as complex as she would have the court believe.

Moreover, common sense and principles of fundamental fairness militate against reversal on the issue of the specific unanimity instruction. Bennett does not claim that the alleged error affected the outcome of the trial, nor

does she claim that the error was prejudicial to her in any other way. Therefore, she cannot show plain error. *United States v. Olano*, 507 U.S. 725, 734-735 (1993). Furthermore, it is undisputed that the predicate state offenses were present in this case, thus leaving the jury only to determine whether the prosection had established the remaining elements of the federal offenses.

F. Sentencing

Blake contends that the district court improperly assessed a two-level enhancement because the Howard beating incident involved the "forcible restraint of the victim such as by being tied, bound, or locked up" under USSG §§ 3A1.3 and 1B1.1(I). This argument is unavailing. Only by reply brief did Blake attempt to provide any support for his claim that the restraint involved in the Howard episode was too minimal to merit the forcible restraint enhancement. Even then, he cites only decisions with no application to the instant case. There was no error by the district court in assessing this enhancement.

Danny next assigns as error the district court's inclusion of monies potentially derived from legitimate business activities in the calculation of the amount of funds laundered. He argues that the court could not consider money earned from legal enterprises regardless of whether he had commingled those funds and that the court arrived at its $1,097,800 figure without any facts supporting a finding that such funds were actually laundered or commingled.

This court reviews a sentencing court's application of the Guidelines to a particular set of facts for clear error, and reviews legal conclusions with respect to the Guidelines de novo. *United States v. Smith*, 39 F.3d 119, 122 (6th Cir. 1994). This sentencing argument fails. First, this court held in *United States v. Bence* 28 F.3d 555, 562 (6th Cir. 1994), that where a defendant charged with money laundering in violation of 18 U.S.C. § 1956(a) commingles laundered money with funds derived from unspecified other sources, all such funds are attributable to the money laundering scheme. "We refuse to read [18 U.S.C. § 1956] in a manner that would reward the more creative money-launderer by allowing him to escape liability altogether by commingling assets or otherwise disguising the source of his funds." *Id.* Although *Bencs* was a § 1956 case while Danny raises a sentencing challenge, the district court here could consider all the funds commingled with proceeds of the illicit enterprises.

Second, the district court did not clearly err in finding that Danny had commingled funds. There is sufficient evidence in the record to support such a finding. For instance, the court could reasonably conclude that Owens commingled funds on the basis of testimony indicating that rental payments contained proceeds from prostitution and gambling, dn that monies involved in the gambling scheme were commingled with money from the bar at one of the topless clubs.

Bennett further challenges the procedure whereby the district court concluded that she was subject to punishment

for the money laundering allegations contained in Count I. She specifically claims that USSG § 1B1.2(d) unconstitutionally allows a judge to usurp a fact-finding function properly left to the jury by permitting the judge to determine guilt as to each object in a multi-object conspiracy. The Supreme Court recently approved of limited judicial fact-finding for sentencing purposes. *See Edwards v. United States*, 118 S.Ct. 1475, 1477-78 (1998). Thus, Bennett's sentencing argument fails.

Finally Blake raises for the first time in his reply brief a challenge to the district court's imposition of a term for kidnaping he received as a result of a separate prosecution. He claims that the court did not follow the process prescribed in the Guidelines for reaching this determination.

This court reviews a sentencing court's application of the Guidelines to a particular set of facts for clear error, and reviews legal conclusions with respect to the Guidelines de novo. *Smith*, 39 F.3d at 122. However, this court does not customarily address matters raised only in a reply brief. *United States v. Perkins*, 944 F.2d 1184, 1191 (6th Cir. 1993).

Nevertheless, even were this court to consider Blake's claim, he would not be entitled to be resentenced. Under USSG §5G1.3(c), a court may, in its discretion, decide to impose a consecutive sentence in order to achieve a reasonable incremental punishment for the instant offense. Contrary to Blake's argument, although the Guidelines

provide a detailed outline of factors for the sentencing court to consider in its decision, "[t]his is not to say...that the district court is required either to (1) use the commentary methodology or else (2) invoke a departure from the Guidelines." *United States v. Covert*, 117 F.3d 940, 945 (6th Cir.), *cert. denied*, 118 S.Ct 204 (1997). Where, as here, the court makes generally clear the rationale under which it has imposed the consecutive sentence and seeks to ensure an appropriate incremental penalty for the instant offense, it does not abuse its discretion. *See Covert*, 117 F.3d at 946 (affirming consecutive sentence where sentencing court implicitly rejected Guidelines methodology.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
DISTRICT COURT NO. 92-20289
APPEAL NOS. 95-6357; 95-6405; 95-6632; 95-6631

UNITED STATES OF AMERICA, APPELLEE,

vs. DISTRICT COURT NO.: 92-20289

DANNY McGEE OWENS
BLAKE OWENS
KAY MILLER BENNETT
IRA JOHN WOODFIN, APPELLANTS.

PETITION FOR REHEARING *EN BANC* AND SUGGESTION FOR REHEARING *EN BANC*

A Rehearing *en banc* is necessary because the proceeding involves a question of exceptional importance.

Oral argument is requested.

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Filed November 17, 1998

I.

SUGGESTION FOR REHEARING

I, Robert G. Gilder, express a belief, based on a reasoned and studied professional judgment that this appeal involves one or more questions of exceptional importance:

1. Whether or not racial prejudice should become an issue in a trial that does not involve charges that are related to civil rights violations.

2. Whether or not the introduction of such inflammatory evidence should ever under any circumstances be outweighed by its probative value.

3. Whether or not the introduction of such prejudicial evidence is plain error.

4. Whether or not the allowance of racial testimony where the charges are not related to civil rights violations is on its face unconstitutional violating due process of law and

the right to a fair trial.

/s/ ROBERT G. GILDER #4832
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COME NOW the Appellants and file this their Petition for a Rehearing *En Banc* and would represent and state as follows:

1. This case was tried over a three month period in the United States District Court for the Western Division of Tennessee at Memphis, as cause no. 92-20289 before Honorable O'Dell Horton, District Judge and a jury verdict was entered on September 29, 1995. The case was appealed to the Circuit Court for the Sixth Circuit and a three judge panel decided and filed the opinion on October 20, 1998, which is attached hereto and marked Exhibit "A". An extension of 14 days to file for a Rehearing was granted by

the Clerk prior to November 3, 1998, extending the deadline to November 17, 1998. This Petition for Rehearing *En Banc* is, therefore, timely filed.

2. The parties suggest that their Petition for Rehearing of their cases *En Banc* is appropriate for the following reasons:

a) The three judge panel that originally heard the appeal misapprehended the extent of racial prejudice that actually occurred at the trial of this case. In dismissing racial bias as a basis for reversing the case; the three judge panel dealt with only the testimony of racial prejudice by the witness, Marsha Shaffer, which the government claimed it was using to show her bias against Danny Owens and to show that Danny Owens was in control of the topless nightclubs. Every witness who testified in the case for the government or defense acknowledged that Owens was the owner of the clubs including Owens himself. Allowing

racial testimony not only by Marsha Shaffer but also by other witnesses on the government's case in chief and in its rebuttal part of the case, shows that there was an unquestioned abuse of discretion by the trial judge who allowed this racist testimony, all of which portrayed Owens as a racist and of being prejudiced against black people before a jury panel where eight members of the 12 member panel were black. When responding to Plaintiff's objections at one point, the trial judge even made the following statements:

> "And race is real, I can tell you that. I don't think I have ever lived a day since even when I've been a judge that I haven't faced racism in some form everyday, but you don't want to hear that, I'm just telling you that's a fact."
>
> "In stores, in restaurants, I face it all the time. Now once they find out I'm a judge, boom, it changes, completely totally different."
>
> "So I don't think that the court ought to prohibit the government from proceeding simply because race--is part of what might surface as a result of the questioning, and I

don't think that I can make a group determination that black people, two-thirds of the jury would be biased against Mr. Owens because of what this witness might say. I don't think I can make. . ."

Tr. Vol. 4, at 851-852
(J.A.2, 804-805)

3. The numerous other racist testimony allowed to be heard by the jury was for no other purpose than to prejudice a two-thirds majority black jury against the Defendants in the case including the testimony by a black Memphis police officer who testified in rebuttal as to the racial prejudice of Owens.

4. The selection of this jury had been made with the government's undisclosed intention to attempt to introduce racial prejudice on the part of Owens when their indictment was for:

1) violation of 18 U.S.C. §1955; 2) violation of 18 U.S.C. §1952; 3) violation of 18 U.S.C. §1956, and 4) violation of 18 U.S.C. §1956; 5) all in violation of 18 U.S.C.

§371; 6) violation of 21 U.S.C. §841 (a)(1); 7) violation of 18 U.S.C. §1955 and 8) violation of 18 U.S.C. §1956 (a)(1). Such racial prejudice testimony had no application to the crimes charged. This evidence was the most forceful part of the government's case, as will be set out, infra, and would have been appropriate only in hate crime cases where the issue was whether or not the accused was disposed toward denying the rights of certain people or groups of people because of their race, sex, creed or prior national origin, etc.

5. Unless the entire Court looks at this issue closely, a horrible precedent will have been set for future trials that will affect the future make up of juries. To allow this decision to stand will also be a violation of due process of law because of the flagrancy of using racially prejudiced testimony in a non civil rights trial.

II.

ARGUMENT

Race-Baiting

The Marsha Shaffer incident:

1. MR. GODWIN: . . . Further, there was an incident later on while she was a dancer during the time period of this indictment where there was an individual that this dancer thought to be of Puerto Rican origin or -- but that Mr. Owens thought to be an African-American in one of the clubs. That she wanted -- this individual wanted Mrs. Shaffer to dance for him. It was her understanding that white female dancers were not allowed to dance with African-Americans, she thought he had a rule.

This incident went on where the individual kept persisting in wanting her, Mrs. Shaffer, to dance for Mr. Owens or for the individual. She eventually did. Mr. Owens observed that and he took her into a back room and physically confronted her and shoved her up against some object, whether it was a stove or something in the back room, and advised her that she wasn't welcome in his club if she was going to dance with that individual.

2. MR. GILDER: Your Honor, as to the other matter, assuming that would be her testimony that did occur, I would simply move at this time to suppress or a motion in limine to prohibit her from going into a matter of that nature.

And as the court is aware on the 12 members of the jury who make up the original panel, I think there are eight African-Americans and four Europe Americans, and I feel like that this would have no probative value as to all of the conspiracies, all of the money laundering counts, all of the other counts of the indictment against Mr. Owens, but I think it is highly -- it could be a highly explosive issue and could cause prejudice on the jury about an incident or an alleged

incident such as this when the incident itself does not relate to any charge in the case.

This is not a case where Mr. Owens has been charged with mistreatment of African-Americans or any other minority. It has nothing whatsoever to do with these charges. And it certainly is the kind of issue when you bring a racial issue before a jury and the alleged discrimination or actions on the part of Mr. Owens were directed toward a group of Americans who make up eight -- well, eight, my math is no good but two-thirds of the jury.

3. MR. WILSON: Two-thirds.

4. MR. GILDER: Then I feel like that this could be the kind of damaging testimony where the prejudice involved would far outweigh any remote concept of probative value in the case.. . ..
Tr. Vol. 4, at 841-43 (J.A.2, 794-796).

5. MR. GILDER: Your Honor, Mr. Godwin. . . is attempting to turn a trial that has nothing to do with race into a racial issue with the jury.

And I know the court can say that it is not a racial issue because the judge is trained and is able to put aside things that a juror is not trained to do, and the biggest effect that we're going to have on this case that had nothing to do with race or any kind of violence directed towards minorities or anything, there's no charges like that, but it is through the ruse that he is creating that he is coming in here and has turned this into a racial trial, and that is exactly what we are trying now is a racial trial, the issues about drugs, prostitution and everything else have gone by the wayside, and if he continues to do this, and the record, it is going to be replete with Danny Owens as a racist. . . .

6. MR. GILDER: Your Honor, I can assure you that no defense attorney, when we were selecting jurors, thought that we were going to come in here and be defending a racial case. And that's exactly what we are defending.

I can understand the weakness in his case and the need to bolster it through prejudice and that is exactly what is happening, and he is turning it into a racial trial, that is exactly what he is doing and going to continue to do that because that is the only way that he can hope to get a conviction. He has no evidence except racial issues to bring up to try and prejudice the jury.

7. THE COURT: Now I will continue, as long as I sit here, to try hard to make it clear, it's not race, it's the rule and relevancy.

Tr. Vol. 5 at 1073-77 (J.A. 2, 888-92).

In addition to Marsha Shaffer, the government offered the following racial baiting testimony:

8. Direct -Haley

Q. So anybody who had this little number this, this number would be on what would be called right-to-work?

A. Yes.

Q. Would the right-to-work fee vary with the period of time?

A. Yeah, if the girl -- it was mainly set up to be six hours or eight hours, it was 20 dollars for six hours, 10 dollars for eight hours, and if you locked her right in at eight, circled the eight on the schedule sheets that came from the office. If you circled the eight, and she went -- ended up working ten, you had the right to knock five extra dollars, it was five dollars for ten hours. And if she worked 12 hours, you haven't -- didn't have to charge her anything as far as a right-to-work.

Q. None of the dancers down here have the small number next to them?

A. That's because they are all black girls and they always pay a right-to-work.

Q. And whose rule was that, Mr. Haley?

A. Mr. Owens.

Q. Now you indicated Baby Face would -- is Baby Face listed on here?

A. She is the second girl down at the bottom. Number 27.

Tr. Vol. 6 at 1200 (J.A. 3, 977).

9. Direct-Collins

Q. Okay. Did everybody have to pay the right-to-work?

A. Yes, but the black girls paid more than the white girls did. But we paid two dollars for each dance that you done.

Q. Where did that money go, ma'am?

A. We paid it to the housemother or the manager, whoever was working at the end of the night.

Q. And so if you came in and they put 15 dances down and let's say that you did four dances that night, actual dances, how many marks would show up on your record that night?

A. You would have to pay for the 15 dances plus the four dance.

Q. So you would have 19 on the record, you wouldn't get credit for the first 15?

A. No.

Q. So you would owe the club for 19 dances in that situation?

A. Yes, plus the right-to-work and the bar tip.

Q. And would you pay the club two dollars?

A. For the dance.

Q. Each dance. What's the bar tip?

A. Okay, depends on -- okay, say you do ten dances,

. . .

Tr. Vol. 6 at 1349 (J.A. 3, 1126).

10. Direct-Jordan

Q. You could drink anywhere you wanted to in the club?

A. Yes, I did.

Q. Okay. Were there rules about how you were supposed to dress?

A. No.

Q. Were there rules about your hair?

A. No, not really.

Q. You say not really, do you remember talking about a rule about blond streaks in your hair?

A. Yes.

Q. What was that rule?

A. He wanted the black girls to have blond hair.

Q. You say he wanted, to whom are you referring?

A. Danny.

Q. Did you have a blond streak in your hair when you came there?

A. I had it before I came.

Q. Excuse me?

A. I had it before I went there -- I went in there.

Q. You mentioned the right-to-work fee, did everybody pay the same right-to-work fee?

A. The black girls paid the same.

Q. As the other black dancers?

A. Yes, all the black girls paid the same.

Q. Were they -- was there any difference in the treatment of the witness -- dancer, excuse me, was there any

difference -- difference in the rules regarding right-to-work regarding black dancers and other dancers?

A. Yes.

Q. What were those differences?

A. The black girls paid ten dollars right-to-work and the white girls didn't but they was on a schedule.

Q. I'm sorry, ma'am?

A. If a black girl was on schedule, she still had to pay a ten dollar right-to-work.

Q. If the white girl was on a schedule did she have to pay that ten dollar right-to-work?

A. No.

Tr. Vol. 6 at 1373-74 (J.A.3 1141-42).

11. Direct-Trasp

A. Dancer stage names.

Q. All right. And what are these columns, these marks indicate?

A. That is the number of dances that the girl did.

Q. All right. Out here next to the dancer's names there are some small numbers --

A. Yes, sir.

Q. -- in that column.

Are you familiar with what those numbers are for?

A. Right-to-work.

Q. What's a right-to-work?

A. That's the girls who are not on schedule, they can come in when they want, get off when they want, and they pay to work six hours, eight hours, ten hours.

Q. How much did they pay?

A. It was 20 dollars for six hours. It was ten dollars for eight hours. And this way they weren't on a set schedule, they didn't have to come in Monday, Tuesday, take off Wednesday, come back Thursday, Friday, Saturday.

Q. These dancers down here that are separated from the other dancers --

A. Yes, sir.

Q. --who are those dancers?

A. They are black dancers.

Q. None of them have the right-to-work fee marked next to them.

Did those dancers pay a right-to-work fee?

A. Yes, they did.

Q. Did they have -- were they on schedule?

A. They were on schedule.

Q. These dancers who paid the right-to-work fee were not on schedule?

A. Yes, sir.

Q. Whose rules were those, sir?

A. They were Danny's.

Tr. Vol. 7 at 1412013 (J.A.3, 1158-59).

12. Direct-Wilson

A. Admission, for juke box, to take care of any problems that happened in the clubs.

Q. Did you ever have any conversations with Mr. Danny Owens about the operation of Stud's Playhouse?

A. Yes, sir.

Q. What were those -- what was the first of those conversations, sir?

A. At first when I was working the door.

Q. Yes, sir.

A. Just the only thing that I had to do was I had to keep all of the blacks out. He said he didn't even want any more than five in that club because that was the smallest club, and he said he didn't want to catch any more than five coming in.

Q. And who gave you that instruction, sir?

A. That was Danny and Blake.

Q. Why would you talk to Mr. Danny Owens about a club that belonged to Mr. Blake Owens?

A. They – they were the bosses, I mean, it was – it was like they were both one person, whatever one said the other one vouched for.

Q. Regarding fines, was there a rule about a color certain dancers had to have in their hair?

A. Just the black dancers.

Q. And what was that rule?

A. They had to have blond streaks in their hair.

Q. Whose rule was that?

A. That was Danny and Blake's rule.

Q. Could a girl – could a dancer, excuse me, be excused from that rule?

A. Yes, sir.

Q. How would a dancer be excused from that rule?

A. Pay 20 dollars a night as a fine.

Q. To keep her own hair color?

A. That's right.

Q. Were their dancers that paid 20 dollars a night to keep their own hair color?

A. Yes, sir.

Q. Were there rules about how money could be transferred between certain types of patrons?

A. Yes, sir.

Q. What were those rules, sir?

A. You talking about from the credit cards?

Q. No, I'm referring to, is it a common practice in topless clubs for customers to put a tip in a dancer's G-string?

A. Yes, sir.

Q. Were all patrons at Stud's allowed to tip dancers in that manner?

A. You see the white customers, they could come up and lay back on the stage with money in their mouth and the girls would squat down over them with their crouch over their face and get the money out of their mouth. The black customers, they could walk up to the stage and hold the money out, that's -- and hand them -- hand the money to the dancer or the dancer could reach out and grab the money.

Q. If a dancer was caught violating that rule, what happened?

A. Hundred dollar fine.

Tr. Vol. 13, at 2456-58 (J.A. 4, 1722-26).

The government called in rebuttal a black Memphis police officer named Charles Newell who gave the following testimony in rebuttal:

13. Charles Newell

Q. Would you state your name, sir.

A. Charles Edward Newell.

Q. And would you spell your last name for the court reporter, please.

A. N-e-w-e-l-l.

Q. Where are you employed, sir?

A. The Memphis Police Department.

Q. And how long have you been with the Memphis Police Department?

A. 15 years.

Q. And what is your rank currently?

A. Oh, I am a lieutenant.

Q. And where are you assigned currently?

A. The Organized Crime Unit.

Q. And specifically within the Organized Crime

Unit, let me ask you this, are you a supervisor there, sir?

A. Yes.

Q. Within the Organized Crime Unit what kind of activities do you supervise the investigation of?

A. My main area of responsibility is the vice-related activities.

Q. And prior to its dissolution, were you assigned the vice squad?

A. Yes.

Q. And were those activities taken over by the organized Crime Unit after the vice squad dissolved?

A. That is correct.

Q. Directing your attention to 1990, were you on temporary assignment to the vice squad at that time?

A. Yes sir, I was a sergeant temporarily assigned to the vice squad.

Q. Did your duties, any of your duties ever have to do with an undercover assignment of a club known as Danny's in Memphis, Tennessee?

A. Yes.

Q. Did your duties, any of your duties ever have to do with an undercover assignment of a club known as Danny's in Memphis, Tennessee?

A. Yes.

Q. Do you know Mr. Danny Owens? Have you ever met him before, let's just put it that way?

A. I've seen him before, yes.

Q. Okay. Did you go to Danny's on an occasion in 1990?

A. Yes, sir.

Q. Was that in the daytime or in the evening?

A. It was in the daytime.

Q. Okay. Was this an undercover assignment?

A. It was an undercover routine check of the club.

Q. Okay. You were to go in as a customer?

A. I was going in posing as a customer, yes.

Q. How were you dressed that night, sir?

A. That day?

Q. Day.

A. I had on a shirt, pair of casual pants and shoes.

Q. Did you have a T-shirt or sport shirt on?

A. No, I had a button up sport shirt, it wasn't a T-shirt.

Q. And the casual pants, were those levis or dressier than levi pants?

A. I don't have any levis, so a pair of slacks.

Q. I know this sounds silly, were you wearing socks and shoes when you went in there?

A. Socks, shoes, the whole works, yes, sir.

Q. When you got to the door that day, sir, were you met by anyone who was employed by the club?

A. I was.

Q. And what, if anything, did that person indicate to you when you attempted to enter the club?

A. Well, he stopped me at the door and he said you will need three pictured identifications. And of course I said, well, I don't have three pictured identifications. He said, well, this is what you are going to need to get in this club.

Q. Did you show him one piece of identification, sir?

A. Well, at that point I wasn't posing as a customer anymore, I showed him my badge and I said this is all I need to get in here. And at that time he allowed me in the club.

Q. You didn't need three pieces of pictured ID after that.

A. Not at that point.

14. When the government used officer Newell in rebuttal, Owens had already testified himself that he owned and controlled the topless clubs so it was absolutely impossible for the government to claim that officer Newell was needed to show that Owens owned and controlled the topless clubs or that Marsha Shaffer was biased against Owens, the two reasons given by the government for using Marsha Shaffer. This again was a continuing example of the government's race-baiting tactics throughout the trial.

15. The introduction of racial bias in a criminal case is not just error, it is Constitutional error. *Dawson v. Delaware*, 503 U.S. 159 (1992). The introduction of this evidence placed the burden of proof upon the government that the introduction of racial evidence in this case was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18 (1967); See also *Miller v. State of North Carolina*, 583 F.2d 708 (CA4 1978).

16. The trial judge who is black, stated his knowledge of Memphis was that race is a part of everything in everyday life and that he had been discriminated against all of his life by white people until they learned that he was a federal judge and then the mistreatment changed once they knew his position. There is no doubt that this is absolutely true but the judge failed to recognize that the average black juror could also be prejudiced against white people, especially those white people that were prejudiced against blacks. That eight black members of the jury gave the Defendants and defense counsel such contemptuous looks, after the racial evidence came in, that all would be dead now if looks could kill. In more than 37 years of practice, I have never seen a trial dominated by racial evidence like this trial was, and my native State is Mississippi. Rule 402 of the Rules of Evidence provides that, "evidence which is not relevant is not admissible". As heretofore pointed out this

irrelevant racial evidence was inadmissable. Even if the testimony of Marsha Shaffer on the racial prejudice of Danny Owens could have been justified under Rule 403, certainly the same type of racial evidence introduced by other witnesses for the government could not be excused. The evidence of racial prejudice of Danny Owens before a two-thirds black majority jury was a blatant violation of due process of law and the right to a fair trial.

III.

CONCLUSION

Because of the Constitutional violations set out herein, supra, this case should be reversed and remanded to the trial court for a new trial and the court should order a full rehearing *en banc* if needed and if the Court decides the rehearing is necessary before reversing its earlier decision, then the Court should set the case down for oral argument because of the extreme importance of whether or not racial

evidence can be used to obtain convictions of Defendants when their charges are totally unrelated to racial prejudice or bias.

IV.

RELIEF SOUGHT

The Petitioner asks the following relief:

1. That the Court rehear this matter *en banc*.

2. That the Court allow oral argument on these issues.

3. That the Court enter an order reversing and remanding this case for a new trial before the lower court.

Respectfully submitted,

/s/ ROBERT G. GILDER #4832
ATTORNEY FOR DANNY M. OWENS
P.O. BOX 193
SOUTHAVEN, MS 38671
(601) 342-1444

CERTIFICATE OF SERVICE

I, Robert G. Gilder, do hereby certify that I have this day served, via U.S. Mail, postage prepaid, a true and accurate copy of the foregoing Petition to the following:

Hon. Frederick H. Godwin
Assistant U.S. Attorney
Federal Building
167 N. Main
Memphis, TN 38103

Hon. Robert E. Harrison
Attorney At Law
P.O. Box 475
Scottsville, KY 42164-0475

Hon. John Coletti
Attorney At Law
115 N. State Street
Jackson, MS 38201

Mr. John Woodfin 13961-076
Pro Se
P.O. Box 9000
W-4
West Memphis, AR 72336

This the 16th day of November, 1998.

/s/ ROBERT G. GILDER

95-6357

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DANNY McGEE OWENS,

Defendant-Appellant.

BEFORE: KRUPANSKY, NORRIS, and SILER, Circuit Judges.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green, Clerk

FILED: December 23, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
	)	
vs.	)	Cr. No. 92-20289-H
	)	
DANNY McGEE OWENS	)	
	)	
Defendant.	)	
	)	

ORDER ON JURY VERDICT

This cause came on for trial on January 11, 1994, the United States Attorney for this District representing the Government and the Defendant, Danny McGee Owens, appearing in person and with Counsel, Robert Gilder.

Jurors were selected and sworn and opening statements were presented by counsel. After listening to all of the proof and arguments in the case the jury began deliberations.

After due deliberation, the jurors returned into open court on April 1, 1994, and announced a verdict of GUILTY as to Counts 1, 4, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, and 21 and NOT GUILTY as to Counts 2, 3, 22, 23 and 24 of the indictment.

IT IS HEREBY ORDERED that upon the jury verdict of NOT GUILTY, Counts 2, 3, 22, 23 and 24 are hereby dismissed.

Jurors were polled individually.

ENTERED this 11 day of April, 1994.

s/ Odell Horton, Judge
UNITED STATES DISTRICT COURT

s/ Frederick H. Godwin
ASSISTANT U.S. ATTORNEY

This document entered on docket sheet in compliance with Rule 55 and/or 32(b) FRCrP on April 11, 1994.

United States District Court
Western District of Tennessee

UNITED STATES OF AMERICA

v. **Case Number: 2:92-CR20289-006**

DANNY McGEE OWENS

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The Defendant, DANNY McGEE OWENS, was represented by Robert G. Gilder, Esq.

The Defendant was found guilty on count(s) 1, 4, 9, 10, 11,12,13,14,15,16, 17,18,19,20, 21 after a plea of not guilty.

Title & Section Numbers	Nature of Offense	Date Offense Concluded	Count
18 USC 371	Consp./Managing Gambling Bus.; Racketeering; Money Laundering	1990 thru 09/1992	1
18 USC 1955	Manage Gambling Business; Aiding & Abetting	1990 thru 11/07/1991	4
18 USC 1956(a)(1)(A)	Money Laundering	09/06/1990 thru	9 thru 21

07/03/1991

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this District within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assignments imposed by this judgment are fully paid.

09/29/1995
Date of Imposition of Judgment

s/ ODELL HORTON
U. S. District Judge

Date Signed: October 6, 1995

Defendant's Soc. Sec. No.: 587-32-3831
Defendant's Date of Birth: 08/05/1950
Defendant's USM No.: 09409-076

Defendant's Mailing Address:
1573 Shelby Drive
Memphis, TN 38116

This document entered on docket sheet in compliance with Rule 55 and/or 32(b) FRCrP on 10-10-95.

IMPRISONMENT

The defendant is hereby committed to the custody of

the United States Bureau of Prisons to be imprisoned for a term of 327 months. The defendant is sentenced 240 months on count 9 to be served consecutively to an 87 months sentence on count 10 for a total of 327 months. 60 months on count 1 to run concurrently to an 60 months sentence on count 4; counts 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21 to run concurrent with counts 9 and 10 making a total sentence of 327 months.

The court makes the following recommendations to the Bureau of Prisons:
A location close to Memphis or Atlanta, GA

The defendant is remanded to the custody of the United States Marshal.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 YEARS.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

While on supervised release, the defendant shall not commit another federal, state, or local crime.

While on supervised release, the defendant shall not illegally possess a controlled substance.

While on supervised release, the defendant shall not possess a firearm or destructive device.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Financial Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth on the next page). The defendant shall also comply with the following additional conditions:

The defendant shall participate in alcohol abuse treatment and urine screens as directed by the probation office.

STANDARD CONDITIONS OF SUPERVISION

1) The defendant shall not leave the judicial district without the permission of the court or probation officer;

2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) The defendant shall support his or her dependents and meet other family responsibilities;

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances except as prescribed by a physician;

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) The defendant shall notify the probation officer within seventy-two hours of being

arrested or questioned by a law enforcement officer;

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

FINANCIAL PENALTIES

The defendant shall pay the following total financial penalties in accordance with the schedule of payments set forth below:

Count	Assessment	Fine	Restitution	CS/CC Counts
1	$50.00			
4	$50.00			
9-21	$650.00	$250,000 (ct. 9) $250,000 (ct. 10)		
Totals:	$750.00	$500,000		

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order:(1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

The total monetary penalties shall be due in installments to commence 30 days after the date of this judgment. If this judgment imposes a period of incarceration, payment shall be due during the period of incarceration. During a period of probation of supervised release supervision, payment shall be a condition of supervision and the U.S. probation officer shall establish and may periodically modify the payment schedule provided that the entire financial penalty is paid no later than the termination of supervision but in no event later than 5 years after release from incarceration.

All financial penalty payments are to be made to the National Fine Center, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program, and mailed to the following address:

Administrative Office of the U.S. Courts
National Fine Center
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Suite C-550
Washington, D.C. 20544

AMENDMENT V TO THE CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI TO THE CONSTITUTION OF THE UNITED STATES

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

COURT OF CRIMINAL APPEALS OF
TENNESSEE AT NASHVILLE

STATE OF TENNESSEE,
Appellee,

v.

HEATHER JO BOYD, KIMBERLY LAMKY and
RAYMOND DOUGLAS WILSON,
Appellants.

Oct. 25, 1995
Permission to Appeal Denied April 8, 1996

Three defendants were convicted of prostitution, and one defendant was also convicted of possession of cocaine and marijuana, in the Circuit Court, Williamson County, Cornelia A. Clark, J., and defendants appealed. The Court of Criminal Appeals, Welles, J., held that: (1) prostitution statute did not give defendants or anyone else sufficient warning that their acts, which did not involve touching of genitals, would constitute "sexual relations" prohibited by statute; (2) evidence was sufficient to convict defendant of possession of cocaine and possession of marijuana; and (3) sentence imposed on one defendant of 15 days of incarceration, on second defendant of seven days of incarceration, and on third defendant of 15 days of incarceration, did not involve error or abuse of discretion.

Affirmed in part and reversed in part.

OPINION

WELLES, Judge.

The defendants appeal to this court as of right from judgments entered on a jury verdict *241 finding them guilty of prostitution [FN1] Raymond Wilson was also convicted of possession of cocaine and marijuana. [FN2] Heather Jo Boyd was sentenced to six months in jail, with the sentence suspended after service of seven days. Raymond Wilson was sentenced to six months in jail, with the sentence suspended after service of fifteen days.

FN1. Tenn. Code Ann. §39-13-513.

FN2. Tenn. Code Ann. §39-17-418.

Three issues are presented on this appeal: (1) That the evidence submitted at trial was insufficient to convict each Defendant of prostitution; (2) that the Tennessee statute prohibiting prostitution is constitutionally void for vagueness; and (3) that the sentences imposed on each Defendant were improper.

On February 23, 1993, the Brentwood Police Department and the Tennessee Highway Patrol set up an undercover prostitution sting operation based at a hotel in Brentwood, Tennessee. The officers placed video cameras in the living room and bedroom areas of a guest room at the hotel. The hidden cameras did not record the entire event because of an inadvertent blind spot in the camera's range. Police officers audited the hotel room from a nearby room that was equipped with television monitors. The arrest team auditing the room were to await the code words from the undercover officer, which by police policy were to be used if the suspects made any physical contact with the officer.

At about 9:17 p.m., an undercover investigator placed a call to "Summer's Fantasy," a business which had advertised in a local newspaper. A woman answered the phone and told the investigator that they "had girls that put on a real good show together." The investigator agreed to pay two hundred and fifty dollars for a one-hour session with "Summer" and "Kendra".

Another officer was parked in a vehicle in the hotel parking lot for surveillance purposes. At about ten o'clock p.m., he was Defendants Boyd and Lamky arrive in a gray Chevrolet Caprice and then enter the hotel. The car then pulled away from the entrance and stopped farther away in the parking lot. A few minutes later, the two women arrived at the undercover investigator's room. Boyd was carrying a red nylon bag, and Lamky requested the two hundred and fifty dollar payment, stating that she had to pay the driver. After receiving the two hundred and fifty dollars from the investigator, Lamky left the room for a brief time and then returned. The officer in the parking lot then took the driver of the car, Defendant Wilson, into custody and searched the car. The police found quantities of cocaine and marijuana in the car.

When Lamky came back to the room the investigator asked if they wanted to "do it" in the living room or bedroom. They chose the living room and then turned on the radio. They started to dance and remove their clothes. Lamky pulled down Boyd's bra, revealing her breasts to the investigator. Boyd then moved her hands down Lamky's body and removed her underpants. Boyd placed her hands on Lamky's buttocks and placed her face near Lamky's genital area. Immediately after this, Boyd crawled over to the investigatory and sucked his finger. The investigator

then signaled to the other officers in the nearby room that the arrests were to be made. As the officers entered the room, Lamky stated that she and Boyd were "straight-up dancers." An officer confiscated the red nylon bag that Boyd had brought and found, among other things, four bottles of hot body paints, four tie-down straps, a rubber dildo, and a clear tube with a squeeze ball.

When interviewed by the police, Wilson said that he was hired to drive the dancers to jobs. His car was searched, and police found a box of business cards for Summer's Fantasy, three condoms, a beeper, cocaine, marijuana and some cash. Boyd owned forty percent of Summer's Fantasy. Boyd and Lamky each said that they got paid for dancing for Summer's Fantasy.

At trial, the jury retired to deliberate and later submitted a question to the court: "Is *242 there a definition for sexual relations?" The court gave the following response: "The Tennessee legislature has provided no statutory definition for sexual relations. It is your duty as jurors to define this."

At the sentencing hearing, the trial court concluded that Boyd was the leader of the prostitution crime because she was part owner of the business. In sentencing the Defendants, the trial court considered the need for deterrence and the need to avoid depreciating the crime.

[1] The Defendants argue that the evidence submitted at trial was insufficient to convict them of the crime of prostitution beyond a reasonable doubt. When the sufficiency of evidence is challenged on appeal, this court must review the record to determine if the evidence submitted at trial was sufficient "to support the finding of the trier of fact of guilty

beyond a reasonable doubt." T.R.A.P. 13(e). This rule is applicable to findings of guilt based on direct evidence, circumstantial evidence, or a combination of the two. State v. Matthews, 805 S.W.2d 776, 779 (Tenn.Crim.App. 1990).

[2][3][4] In determining the sufficiency of the evidence, this court does not reweigh or reevaluate the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Nor may this court substitute its inference for those drawn by the trier of fact from circumstantial evidence. Liakas v. State, 199 Tenn 298, 305, 286 S.W.2d 856, 859 (1956). This court is required to give the State the strongest legitimate view of the evidence contained in the record as well as any reasonable and legitimate inferences which may be drawn from the evidence. State v. Herrod, 754 S.W.2d 627, 632 (Tenn. Crim. App. 1988).

[5][6] Questions concerning the credibility of witnesses, the weight and value to be given tot he evidence, as well as all the factual issues raised by the evidence, are resolve by the trier of fact, not this court. State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the State. State v. Grace, 493 S.W.2d 474 (Tenn. 1973)

[7][8] The Defendant has the burden in this court showing why the evidence is insufficient to support the verdict returned by the trier of fact. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This court will not disturb a verdict of guilt unless the facts contained in the record and the inferences which may be drawn from those facts are insufficient , as a matter of law, for a rational trier of fact to find the Defendant guilty beyond a reasonable doubt. State

v. Matthews, 805 S.W.2d at 780.

Tennessee Code Annotated section 39-13-512(5) defines prostitution as engaging in sexual activity as a business. "Sexual activity" is defined only as sexual relations, including homosexual sexual relations. Tenn. Code Ann. §39-13-512(6).

The Defendants do not dispute what factually occurred int he hotel room on the night in question. The question that remains, however, is whether the conduct by Boyd and Lamky amounted to"sexual relations." As the statute in question gives no guidelines on how to define sexual activity other than to say "sexual relations," we must consider if a rational trier of fact could find that the conduct in the hotel room amounted to "sexual relations." Although there was no touching of the genitals by either party, Body and Lamky danced with each other while nude, Boyd touched Lamky's buttocks, put her face in the area of Lamky's genitals, and also sucked on the finger of the investigator.

[9][10][11][12][13][14] The purpose of codification of all criminal offenses is to advise the public as to what conduct is criminal. The Defendants argue that Tennessee Code Annotated section 39-13-512 is unconstitutionally vague in violation of the due process requirements under the 14th Amendment to the United States Constitution, thus making it necessary to reverse the Defendants' convictions. The Due Process Clause of the 14th Amendment prohibits the States from holding a person criminally responsible for conduct that is not reasonably understood to be proscribed. United States v. Harris, 347 U.S. 612, 617, 74 S.Ct. 808, 811-12, 98 L.Ed 989 (1954). Also due process requires that people be given sufficient warning that they may avoid ***243**

prohibited conduct. Rose v. Locke, 423 U.S. 48, 49-50, 96 S.Ct. 243, 243-44, 46 L.Ed2d 185 (1975). If people of common intelligence must necessarily guess at the meaning of a statute and differ as to its application, then the statute is unconstitutionally vague and invalid. Harris, 347 U.S. at 617, 74 S.Ct. At 811-12; Underwood v. State 529 S.W.2d 45, 47-48 (Tenn. 1975); Estrin v. Moss, 221 Tenn. 657, 430 S.W.2d 345 (1968). However, a statute will not be considered unconstitutionally vague and therefore invalid simply because the reviewing court believes it could have been drafted with better precision. Robinson v. United States, 324 U.S. 282, 286, 65 S.Ct. 666, 668, 89 L.Ed. 944 (1945); State v. Lunati, 665, S.W.2d 739, 744 (Tenn. Crim. App. 1983), cert. Denied, 466 U.S. 938, 104 S.Ct. 1913, 80 L.Ed2d 461 (1984). Furthermore, vagueness in official documents will constitute a violation of due process only when the aggrieved party can show that the statute failed to give adequate notice of some duty that the government was imposing on them. Murray v. Norbert, 423 F.Supp. 795, 796 (D.R.I. 1976).

In 1989 with the passage of the Criminal Sentencing Reform Act, the legislature abolished all common-law offenses. Before conduct can now constitute a violation of the criminal law, it must be "defined as an offense by statute, municipal ordinance, or rule authorized by and lawfully adopted under a statute." Tenn. Code Ann. § 39-11-102(a)(1991 Repl.). This provision is essential to two of the stated objectives of the criminal code:

> [to g]ive fair warning of what conduct is prohibited, and guide the exercise of official discretion in law enforcement, by defining the act and the culpable mental state which together constitute an offense; [and to g]ive fair warning of the consequences of violation...

Tenn. Code Ann. § 39-11-101(2) &(3).

[15] Thus, our code recognizes the importance of clearly defined criminal offenses. Clear definition is essential not only for the benefit of the accused but also to comply with state and federal constitutional obligations. Tenn. Const. Art. 1, §§ 8 & 9; U.S. Const. Amend. VI, XIV. If an offense is not defined to as to afford persons of ordinary intelligence fair notice of what conduct is prohibited, it violates due process. State v. Netto, 486 S.W.2d 725, 728 (Tenn. 1972).

[16] The standard for defining "sexual relations" and prostitution has been the subject of much dispute. Som courts have considered the fondling of genitals, buttocks, and breasts to be "sexual relations." People v. Love, 111 Cal.App.3d Supp. 1, 168 Cal.Rptr. 591 (Super. Ct. 1980). On the other hand, nude modeling has been held not to be prostitution. People v. Hill 103 Cal.App.3d 525, 163 Cal.Rptr. 99 (1980). Although many people would agree that actual intercourse is not necessary to constitute "sexual relations," there may be much disagreement as to which sexually arousing or suggestive acts short of intercourse constitute sexual relations and which do not.

The state would have this court follow the lead of the Superior Court of Pennsylvania in Commonwealth v. Robbins, 358 Pa.Super. 225, 516 A.2d 1266 (1986). In that case, the owner of the massage parlor was arrested for prostitution for allowing the massing of male genitals for sexual stimulation. The court held that the prostitution statute, which is very similar to Tennessee's statute, did not fail for vagueness because men of common intelligence would know that masturbation as a business would fall under the umbrella of "sexual activity." Id. 516 A.2d at 1268. In

the case sub judice, however, there was no proof of any contact with the genitals of either the dancers or the investigator.

The Defendant Lamky would have us follow the Pennsylvania Superior Court's ruling in Commonwealth v. Leigh, 402 Pa.Super. 169, 586 A.2d 450 (1991), in which it held that nude dancers were not guilty of prostitution for the self-masturbation of the viewers where the dancers and viewers were separated by a pane of glass and there was no contact between them. Id. 586 A.2d at 453. Of course, in the case sub judice, there was some contact between the dancer and the patron.

The facts herein lie somewhere in between the two Pennsylvania cases. There was some contact between the dancers and between ***244** the dancer and the patron, but there was no touching of the genitals between the dancers and only the finger of the patron was touched. The question is whether the statute gave the dancers adequate warning that their conduct amounted to "sexual relations." The business in question, Summer's Fantasy, continued to operate after these arrests, and, according to Defendant Boyd's testimony at her sentencing hearing, the company has performed essentially the same routine for other police officers (not undercover) with no problems. While there is no doubt that the dancers intend for their act to be sexually arousing and suggestive of more intimate acts, we conclude that the language of the statute die not give them or anyone else sufficient warning that those acts would constitute "sexual relations" such as is prohibited by the prostitution statute.

[17] We emphasize that we do not find Tennessee's prostitution statute to be unconstitutionally vague. The

statute remains enforceable. We do conclude that the statutory language does not clearly prohibit the conduct of the Defendants in the case sub judice.

[18] Defendant Wilson also argues there was insufficient evidence to convict him of possession of cocaine and possession of marijuana. The cocaine and marijuana were found in the car Wilson was driving on the night in question. No explanation was presented for this at trial. We conclude there was sufficient evidence to convict him of both counts.

[19] Finally, the Defendants argue that the sentences imposed by the trial court were excessive. Even though we reverse and dismiss the convictions for prostitution, we will address the sentencing issues to facilitate possible further judicial review.

[20][21] When there is a challenge to the length, range or manner of service of a sentence, it is the duty of this court to conduct a de novo review with a presumption that the determinations made by the trial court are correct. Tenn.Code. Ann. §40-35-401(d). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). The Sentencing Commission Comments provide that the burden is on the appellant to show the impropriety of the sentence.

[22] Our review requires an analysis of (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternative; (4) the nature and characteristics of the offense; (5) any

mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's potential for rehabilitation or treatment. Tenn.CodeAnn. §§40-35-102,-103 and -210; State v. Smith, 735 S.W.2d 859, 863 (Tenn.Crim.App. 1987).

[23][24][25][26][27] In misdemeanor sentencing, a separate sentencing hearing is not mandatory but the court is required to provide the Defendant with a reasonable opportunity to be heard as to the length and manner of the sentence. TennCode Ann. §40-35-302(a). The sentence must be specific and consistent with the purposes and principles of the Criminal Sentencing Reform Act of 1989. Tenn. Code Ann. §40-35-302(b). The trial court retains the authority to place the Defendant on probation either immediately or after a period of periodic or continuous confinement. TennCode Ann. §40-35-302(e). Misdemeanor sentencing is designed to provide the trial court with continuing jurisdiction and a great deal of flexibility. One convicted of a misdemeanor, unlike one convicted of a felony, is not entitled to a presumption of a minimum sentence. State v. Creasy, 885 S.W.2d 829, 832 (Tenn.Crim.App. 1994).

[28][29][30][31] The Defendants argue on appeal that the trial court erred in denying their request for probation. Among the factors applicable to the Defendants' application for probation are the circumstances of the offense, the Defendants' criminal record, social history and represent condition, and the deterrent effect upon and best interest of the Defendant and the public. State v. Gennoe, 851 S.W.2d 833, 837 (Tenn.Crim.App.), perm. To appeal denied, id. (Tenn. 1992); ***245** State v. Grear, 568 S.W.2d 285 (Tenn. 1978), cert. Denied, 439 U.S. 1077, 99 S.Ct. 854, 59 L.Ed.2d 45 (1979). In determining the actual period of confinement

for a misdemeanor sentence, the enhancement and mitigating factors may, in addition to the purposes and principles of the sentencing, be considered. Because especially mitigated or standard offenders convicted of Class C, D, or E felonies are presumed to be favorable candidates for alternative sentencing, the same presumption would logically apply to misdemeanors. Gennoe, 851 S.W.2d at 837; see Tenn.Code Ann. §40-35-102(6). The ultimate burden for establishing an entitlement to probation, however, remains upon the applicant. See Tenn. Code Ann. §40-35-303(b).

[32] Defendant Boyd was sentenced to six months in jail suspended after service of fifteen days, followed by six months of unsupervised probation, along with a five hundred dollar fine. Boyd has a previous conviction of DUI in Wilson County, Tennessee in 1992. The trial court found as a mitigating factor that there was no serious harm or bodily injury caused by Boyd's conduct. It found as an enhancement factor the fact that she was a co-owner of the business in question and therefore the leader in the commission of the offense. The trial court also found that some period of incarceration was necessary to avoid depreciating the offense and for general deterrence. In light of the Defendant's past criminal conviction and the need for deterrence and to avoid depreciating the crime, the trial court's decision to sentence her to fifteen days of incarceration does not constitute error or an abuse of discretion.

[33] Defendant Lamky was sentenced to six months in jail suspended after service of seven days, followed by six months of unsupervised probation. The Defendant had no prior arrests or convictions. The court found as a mitigating

factor the fact that her conduct neither caused nor threatened serious bodily injury. The court found no enhancement facts, but did emphasize the need for deterrence and avoiding depreciating the crime in requiring her to serve seven days in jail. Again, we find no error or abuse of discretion.

[34] Defendant Wilson was sentenced to six months in jail suspended for each count after service of fifteen days, to be served concurrently, followed by six months of unsupervised probation. He had no past arrests or convictions. The court found no enhancement factors or mitigating facts, and emphasized the need for deterrence and to avoid depreciating the seriousness of his offenses. We find no error of discretion.

We again note that a trial judge has a certain amount of discretion in setting an appropriate sentence and that a presumption of correctness accompanies that determination. Furthermore, we do not intend to place trial court judges in a judicial straight-jacket by infringing on their discretionary powers when their actions are supported by valid considerations. Moten V. State, 559 S.W.2d 770, 773 (Tenn. 1977); see State v. Ashby, 823 S.W.2d 166, 171 (Tenn. 1991). The Defendants' convictions for prostitution are reversed and those charges are dismissed. The Defendant Wilson's convictions of possession of marijuana and possession of cocaine and the sentences imposed therefor are affirmed.

WADE and PEAY, JJ., concur.